88-226

Supreme Court, U.S.
FILED
AUG 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BENJAMIN R. WARD, et. al.,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETER L. ZIMROTH,
Corporation Counsel
for the City of New York,
Attorney for Petitioners,
100 Church Street,
New York, New York 10007.
(212) 566-8686 or 4699

LEONARD J. KOERNER,*
LARRY A SONNENSHEIN,
JULIAN L. KALKSTEIN,
of Counsel.

August 3, 1988

*Counsel of Record

5 7 PP

QUESTION PRESENTED

Did the Second Circuit apply the proper constitutional standard of review as articulated in prior holdings of this Court in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) and United States v. Albertini, 472 U.S. 675 (1984) in concluding that the municipal agency's content neutral regulations reducing offensive noise of performances in an urban park, promulgated after a lenghty and thorough investigation, which in part required that an approved private sound engineer would control the sound board thereby limiting the loudness but providing the sound mix the performers desired, was unconstitutional as an improper infringement of artistic expression under the First Amendment based on its finding that the municipality failed to prove its regulations were the "least intrusive" and that the mu-

nicipality, barring any other realistic technological alternative, could always "pull the plug" although the Court never commented on any possible threat to public safety and park property such conduct may create?

PARTIES

The parties in this case when it commenced, were as follows:

1. Rock Against Racism, plaintiff.

2. Benjamin R. Ward, in his official capacity as Police Commissioner of the City of New York, defendant.

3. George Scarpelli, in his official capacity as Chief of Operations for the Department of Parks, defendant.

4. Sheldon Horowitz, in his official capacity as Special Events Director for the Department of Parks, defendant.

5. Robert Russo, in his official capacity as Assistant Commissioner for City-wide Services for the Department of Parks, defendants.

6. Joesph Killian, in his official capacity as Program Director for The Mall Bandshell of the Bethesda Terrace area of

Central Park in New York City, Department of Parks, defendant.

7. Mayor Edward Koch, in his official capacity as Mayor of the City of New York, defendant.

8. The City of New York, defendant.

The petitioners are parties 2 through 7, defendants below.

The respondent is party 1, plaintiff below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
PARTIES TO THE PROCEEDING.....	iii
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS.....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT	26
CONCLUSION	49

TABLE OF AUTHORITIES

Cases	Page
ACORN v. Frontenac, 714 F.2d 813 (8th Cir. 1983)	45,46
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	30,43
City of Wateska v. Illinois Public Admin. Council, 796 F.2d 1547 (7th Cir. 1986), aff'd without opinion, ____ U.S. ____, 107 S. Ct. 919 (1987), reh. den., ____ U.S. ____, 107 S. Ct. 1389 (1987), ..	43,44
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)	30,32 33,35
Grayned v. City of Rockford, 408 U.S. 104 (1972)	31,39 40
Heffernon v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1986)	30
Ilinois Election Board of Socialist Workers Party, 440 U.S. 173 (1979)	32
Illinois v. Lafayette, 462 U.S. 640, 647 (1983)	36
Jim Crockett Promotion, Inc. v. City of Charlotte, 706 F.2d 486 (4th Cir. 1983)	41,42

	Page
Kovacs v. Cooper, 336 U.S. 77 (1949)	31
Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)	31
Perry Education Ass'n v. Perry Local Educators Ass'n., 460 U.S. 37 (1983)	30,32
Reeves v. McCann, 631 F.2d 377 (5th Cir. 1980), reh. den., 638 F.2d 762 (1981), ...	38,39
Regan v. Time, Inc., 468 U.S. 641 (1984)	37
Schulz v. Frisby, 807 F.2d 1339 (7th Cir. 1986) vacated, 818 F.2d 1284 (1987), aff'd, 822 F.2d 642 (1987), further consideration of the question of jurisdiction is postponed to the hearing of the case on the mertis, 484 U.S. ____, 107 S. Ct. 692 (1988), rev'd., ____ U.S. ____, 56 LW 4785 (1988)	38,45
Shelton v. Tucker, 364 U.S. 479 (1960)	40
United States v. Albertini, 472 U.S. 675 (1985)	35,36
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	37
United States v. Sharpe 470 U.S. 675 (1984)	37

No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BENJAMIN R. WARD, et. al.,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

The petitioners, Benjamin R. Ward, et al., respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-titled proceeding on June 2, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated June 2, 1988 is reprinted in the Appendix at page 1. The opinion of the United States District Court for the Southern District of New York, dated April 16, 1987 is reported at 658 F. Supp. 1346 (S.D.N.Y. 1987). A copy is reprinted in the Appendix at page 23. The opinion of The United States District Court for the Southern District of New York dated April 30, 1987 is reprinted in the Appendix at page 85.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered June 2, 1988. The jurisdiction of this Court is invoked under the provisions of 28

U.S.C. §1254(1). This petition has been filed within the time allowed by law.

STATEMENT OF THE CASE

a. Why Use Guidelines Were Formulated for the Bandshell.

The Central Park Naumburg Acoustic Bandshell (hereafter "Bandshell"), designed to amplify sound, is a hexagonal amphitheater (466, 809, 891).[1] The Bandshell is the most frequently used park facility in New York City (466), with the greatest portion of events attracting large crowds (466, 802). In fact, no other park facility has more events with crowds in excess of 1000 people than the Bandshell (466). The Bandshell season begins in the Spring and runs until early Fall. Approximately 160 to 175 permits issued for events in Central Park involve the use of the Bandshell (466).

---

[1] References in parentheses refer to the Appendix filed in the Court of Appeals by respondents.

JOSEPH KILLIAN assumed the position of Program Director for the Mall/Bandshell/ Bethesda Terrace of the City of New York Department of Parks and Recreation ("Program Director") on January 27, 1986 (436, 438, 439). Killian was the first Program Director for the Mall/Bandshell/ Bethesda Terrace area, the position having just recently been created. At the time of his hiring, he was told by Parks officials that the new position had been created to consolidate the fragmented responsibility for the Bandshell, and in recognition of the Bandshell's unique function as the busiest New York City park facility (464-465, 803). As an adjunct to the fragmented bureaucratic structure surrounding the Bandshell, Killian was advised there was a lack of a single source of rules governing it's use (803). In response, Killian's initial and primary responsibility when he commenced employment

with the City was to develop a set of guidelines to be applied consistently to all applicants for the Bandshell area (hereafter referred to as the "Use Guidelines") (470). Use Guidelines were to apply to all sponsors of events at the Bandshell regardless of the type of event or expression presented (478). The Guidelines were never intended to limit or restrict the type of event (478); rather, they were to inform prospective applicants of the varied potential of the Bandshell, and to specify what was expected of them as users of the Bandshell (471).

Prior to his employment with the City, Killian had been intimately involved in theatre, dance, music concerts and special events programming and production and, therefore, was familiar with the general framework that would be needed to create the Use Guidelines (804). To develop specific guidelines appropriate for the

Bandshell facility, Killian familiarized himself with the particular characteristics, requirements, strengths, and disadvantages of the Bandshell, as well as its organizational place in the Parks Department (804).

Killian learned that Central Park receives more than 13,000,000 visitors annually (802). He found that recent studies reviewed by the Parks Department showed that the large majority of visitors to Central Park came to relax (456, 473, 809, 824-829). On the weekends, passive recreation accounted for over 80 percent of park use, with simple "relaxation" alone reaching nearly 60 percent (456, 809, 824, 827). Music accounted for 5.7 percent of weekend park use (826; see, copy of 1983 City University of New York Study of Central Park [825-849]).

Two or three hundred yards southwest of the Bandshell is the Central Park area known as the "Sheep Meadow" (809). It is a thirteen-acre plot of land set aside for passive recreation (453,809). The Sheep Meadow was designated a quiet zone, along with several other areas throughout the City, by mayoral decree of Edward I. Koch on July 25, 1985 (453, 809). No organized sports are allowed in the Sheep Meadow; people sun themselves there, read books, sit down and relax (809). According to Robert Russo, a Deputy Commissioner of Operations, visitors in the Sheep Meadow are affected by loud performances in the Bandshell (888).

b. Why the City System Decided to Require Use of Its Own Sound Amplification for Events at the Bandshell.

In formulating the Use Guidelines, the decision was made to require use of the City's sound amplification for events at the Bandshell. Killian's decision was rooted in

two problems his investigation disclosed. Sound amplification at the Bandshell conflicted with the enjoyment of other park users, as well as residents in nearby, park-adjacent buildings. Since the Bandshell "is in the heart of the park" (480) and, as noted, passive recreation accounted for over 80 percent of the Park's use, Killian was concerned with past complaints which indicated "that sound levels were continuing to bleed out beyond the concert ground area for many events" (455). Moreover, Killian had to consider the close proximity of the Sheep Meadow, a designated "quiet zone" (453) because "(p)eople enjoy sunbathing and relaxing" (486). Killian was not interested in controlling the "content or quality" of Bandshell events (581).

The second reason Killian decided that sound amplification at the Bandshell should be provided by the Department of Parks was

that he learned "that groups were often unfamiliar with producing events outdoors and they would come in with inadequate equipment and both their event and also the audience that was there would suffer" (450). Killian learned that such groups unable to "mix" the sound very well, would resort to loudness to compensate for their lack of mixing skill (843). Therefore Killian was "looking for a way that we could provide quality sound and yet sound that did not bleed over into other areas of the park ..." (488). To achieve this purpose, Killian decided to hire a private sound company for all Bandshell events.

Killian indicated that he had considered alternative solutions to the sound problem. He considered negotiating with each individual group and agreeing on a decibel level (489). He considered allowing the public user to bring in its own sound system

while the Department of Parks would provide the sound technician (489). Killian considered as his third option "getting an independent vendor to provide sound, someone with extensive experience in all phases of music and dance and theatre to provide sound" (489). The first option was rejected because it was impossible to pick out a single decibel level because it could not be enforced and differences in temperature, foliage and audience size made picking one decibel level "very, very difficult" (490, 575, 576). The second option was rejected because most technicians prefer to work with their own equipment (489), and lack of familiarity with the equipment would interfere with their ability to do a good job. In this way, Killian concluded that his third option was the most viable (489).

After the decision was reached to hire a private company, Killian contacted Gary Floyd as a consultant to draw up a "menu" of basic needs the Department of Parks would want from a private sound company (491). Killian told Floyd he "wanted somebody with outdoor experience, good quality reputation, and also a good inventory ... I wanted to make sure they could do an entire season without breakdown" (494). Floyd was qualified for the job because he was a self-employed consultant who advises clients regarding sound, lighting and staging of performance and theatrical events (336). He had been working in the area for 17 years (336).

After evaluating proposals by independent sound companies with Floyd (341, 342), New York Sound (hereafter "NYS") was chosen by Killian as the private vendor to provide sound amplification at

Bandshell events. NYS was selected because "they had the most extensive state-of-the-art equipment and they had the most backup and they had extensive outdoor experience" and the lowest bid (495). NYS provided sound amplification at every event in 1986 except for the RAR event (496). Killian stated that even after NYS was chosen, private sponsors who had put in applications for the 1986 season were sent a "tech requirement form" to fill out by which they could advise NYS what type of sound equipment, such as microphones, speakers and amplifiers, they would need at their event (496-497, 851-852).

Killian acknowledged that after NYS was chosen, all the private sponsors were "concerned." However, no sponsor canceled, and of the 50 to 60 amplified events which Killian attended in the 1986 season that NYS worked (498, 501),

including speeches, poetry, dance, theatre, jazz, opera and children's groups, no one expressed dissatisfaction or complained that the quality of the sound provided was inadequate (498-499). At the amplified events, "[t]he private sponsors would designate one person to be at the mixing board[2] and to say to the [NYS] technician what their preference on sound quality was" (501). Killian believed that "[NYS] tried to reflect the sponsor's interest as best as possible" (501). NYS provided a "consistency factor" because of its familiarity with the outdoor concert grounds and the bandshell itself (522).

---

[2] As explained by RAR's sound technician, ALAN THOMPSON, the mixing board is a console that combines all the sound signals from individual microphones placed before vocalists or instrumental performers, and "mix(es) them into one signal and feed(s) it into the sound system" (74).

c. How the Sound Company Was Chosen to Amplify Sound Events at the Bandshell.

GARY FLOYD, who was hired by Killian to assist him in evaluating proposals or bids for sound amplification at the Bandshell submitted by sound companies, made his recommendation based on three factors: 1) breadth of inventory of equipment (353); 2) recommendations from contractors who used the services of the bidders (353); 3) the ability to provide more than just sound, but expertise and assistance to performers (351-352). After a trial basis of nine performances, NYS was hired by the City (355). NYS provided service for the "full range of things," ... folk musicians, rhythm and blues, rock and roll. (362). Floyd found the reaction from performers was positive (361) and no audience complained of inadequate mix (363). As for the "louder events," Floyd was of the view that NYS

showed "remarkable sensivity" to balancing volume and esthetic mix" (362-363).

Floyd did not believe that placing a City-designated engineer at the sound board compromised the reproduction of amplified sound (386, 390). The technician, explained Floyd, gets his information from the performers at a "sound check" before the show (389). In this way, concluded Floyd, an experienced technician can within a span of "generally five minutes" provide the desired mix of any band (390).

d. How the Sound Level Is Determined at a Bandshell Event.

Killian explained that "the private sponsor would basically designate one person to be at the mixing board and to say to [the City-designated] technician at the board what their preference on sound quality was" (501). In other words, the technicians

would mix according to the sponsor's direction (492).

Volume was not set a one level because if more people arrived at an event, the volume might have to be raised (493-494). If there was a disagreement between the sponsor and the City technician about volume, they would discuss the excessive sound and the fact it was bleeding into adjacent areas (493, 505, 508-509, 511). The sponsor and City technician would go to the periphery of the concert ground and then go back to the mixing board and adjust the volume (505). Killian could not recall an instance where the sponsor objected to sound being turned down if it was excessive outside the concert area (511).

e. RAR Saw the Outer Limit on Volume as That Which Causes "People's Ears to Bleed."

Robert Russo, Deputy Commissioner of Operations for the Department of Parks, found that there was always a volume problem at RAR events. When asked to turn the sound down, RAR sometimes complied, sometimes they did not (637, 654, 656). They could not be relied upon to voluntarily turn down the sound (657). In 1983 and 1984, the police "pulled the plug" on the sound system at an RAR event because it had gone on beyond the time allowed by the Park's permit (331).

ALAN THOMPSON, sound engineer for RAR, explained that RAR would rent a sound setup that all the bands shared. Thompson explained that if RAR did not provide the sound equipment, the bands would bring their own equipment and charge RAR "by expenses" (99).

As for a limit on sound, Thompson stated:

> A. I think a volume that cause people's ears to bleed would be too loud (121-122).

* * *

As to a sound level unreasonably loud, Thompson stated:

> I would say that a painfully loud -- if it was painfully loud that would be unreasonably loud (121-122).

Thompson acknowledged that he was unfamiliar with the quality of equipment provided by NYS, the company hired by the Parks Department to provide sound at Bandshell events (127). He also admitted that he had not attended any event at the Bandshell in 1986 during which NYS provided the sound amplification (128). Accordingly, Thompson had "no way of knowing how [New York Sound] produce[d] an event" (128).

f. The District Court's Opinion.

The theory of plaintiff's amended complaint, dated October 30, 1986 (amended after issuance of the Use Guidelines) was that the Guidelines violated their First Amendment rights by "illegally ... regulating the manner and presentation of sound through a sound system." After five days of testimony (A27)[3], the District Court found the objective of the City in hiring a sound company was to place control of the volume in its hands and ensure the quality of sound at Bandshell events (A40). This approach arose out of the City's concern that amplified sound generated at Bandshell events be sufficient to reach all listeners in the defined concert areas but that the sound

---

[3] References preceded by the letter "A" are references to the Appendix to this petition.

not extend unnecessarily beyond the listening area (A43).

The District Court found the City had a legitimate governmental interest in controlling excessive sound (A44). Sponsors of events at the Bandshell are entitled under the First Amendment to content-neutral regulations which guarantee them a level of sound amplification reasonably necessary to carry their message to the outer boundaries of the audience area (A45). In this light, the District Court found the content-neutral sound amplification regulations were sufficiently narrowly tailored to further a legitimate state interest (A47-48). The City's implementation of the Bandshell guidelines provides for a sound amplification system capable of meeting RAR's technical needs and leaves control of the sound "mix" in the hands of RAR (A46-47).

After issuance of the District Court's opinion, RAR moved to amend the judgment to clarify whether the Opinion and Order allowed RAR to "actually control the mixing board and sound system." The District Court interpreted RAR's motion to "suggest" that the City-designated technician "is not able properly to implement a sponsor's instructions as to sound quality or mix" (A89). Significantly, the District Court found:

> No evidence to that effect was offered at trial; as noted, the evidence is to the contrary (A89).

Accordingly, the District Court expressed its intention that control of the mixing board would be in the hands of the City-designated technician (A88). However, the technician, the District Court ordered, "is required to defer to the sponsor's desires as to sound quality, but not to the sponsor's demands for increased volume, subject only to those

constitutional entitlements described in the prior opinion" (A88-89). In other words, the District Court not only found that the guidelines did not infringe on RAR's First Amendment rights, but it "ordered" the City to follow the Guidelines in order to insure that RAR's rights remained intact.

g. The Court of Appeals' Opinion

The Court of Appeals did not disagree with the District Court conclusion that the City had the right to regulate expressive conduct which has harmful effects on others (A10). The Court recognized the priniciple that content-neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a governmental interest and do not unreasonably limit alternative avenues of expression (A11):

> However, the method and extent of such regulation must be

> reasonable, that is, it must be the least intrusive upon freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation. United States v. O'Brien, 391 U.S. 367, 377 (1968); Legi-Tech Services, Inc. v. Keeper, 766 F.2d 728, 735 (2d Cir., 1985). See United States v. Albertini, 472 U.S. 675, 688-89 (1985) (A12).

Applying its "least intrusive" test to the facts at bar, the Court of Appeals held the City's regulation valid only to the extent necessary to control volume (A18). The Court found that this end could be "achieved by a volume limiting device in possession or control of a city employee" (A18). The Court added that the City "has not shown that the use of devices to limit sound output is not technologically feasible" (A19). In any event, the Court concluded that the City could resort to pulling the plug (A21, n. 6). The Court's opinion failed to reveal that the Court had any appreciation of the substantial risk to public safety and park

property that such suggested conduct would create.

Finally, the Court concluded that the City's regulations somehow standardized a musician's expression (A21). No facts were cited by the Court to substantiate its conclusion, nor was reference made to the District Courts' fact-finding that the evidence at trial demonstrated that the sponsor's instructions regarding sound quality or mix could be achieved under the City's Use Guidelines.

Accordingly, the Court of Appeals upheld the District Court's judgment in so far as it sustained the right of the City to limit volume of performances at the Bandshell (A22). To the extent the District Court upheld the Use Guidelines requirement of the use of a sound system and a designated technician, it was reversed (A22).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Second Circuit held that the Use Guidelines promulgated by the Department of Parks requiring permitees of the Naumberg Bandshell in Central Park to use the Park's sound system and sound technician were unconstitutional in that the designated method of regulating the volume of sound was not the "least intrusive" upon the freedom of expression. The Court did not disagree with the District Court that the City had the right to regulate excessive noise in the Bandshell with content-neutral time, place and manner regulations. But in a most extreme application of the "least intrusive" principle it found that the City could retain control of the volume emitted from the loudspeaker system but not the sound mix. This fine distinction improperly substitutes the judgment of a Court for that

of a locality in determining what is an appropriate time, place and manner regulation. The inappropriateness of the Court of Appeals distinction between controlling the sound and mix is highlighted by its suggestion that if there is no method whereby the City could control only volume, the City could "[a]s a last resort", pull the plug to enforce the sound limit. It does not have to be emphasized that "pulling the plug" during a concert before a large excited audience is not a practical alternative.

The Court of Appeals failed to address itself to any of these local problems, including technological feasibility of its ordained solution and the risk to public safety and park property in the event the plug is pulled on an event, problems that confronted the Park's Department when it devised its regulation scheme. Moreover,

the Circuit Court, while alleging that the City's regulation "standardized" expression, simply ignored the fact-finding by the District Court that the evidence adduced at trial had demonstrated that artistic expression remained intact because the City technician had to follow the "sponsor's instructions as to sound quality or mix." In other words, RAR had in no way established that their speech was restricted.[4]

The holding of the Court of Appeals marks the continued intransigence by certain federal appellate courts including the Seventh and Eighth Circuits, to the mandate of this Court that due deference must be

---

[4] In fact, RAR was completely unfamiliar with the quality of the equipment provided by the City's hired sound company, never having used the equipment or attended an event at the Bandshell conducted pursuant to the Guidelines (128). Moreover RAR was unaware of how the sound company and the City technician "produce[d] an event" (128).

accorded legislative bodies enacting statutes that are more attuned to the problems of the locale and who are in a better position to make remedial determinations than a court, particularly when the challenged regulations are content-neutral. It is submitted that this Court should address the practice of applying the "least intrusive standard" to the "narrowly tailored prong" test of content-neutral regulations in a manner that results in ad hoc determinations by Courts of Appeal under the guise of First Amendment analysis, and thereby place an onerous standard of review on responsible agencies while allowing improper judicial usurpation of the function of government. As we will show below, this decision violates the spirits and principles of this Court's decision in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

The Second Circuit's reading of a "least intrusive standard" into the "narrowly tailored prong" test of content-neutral regulations conflicts with the decisions of this Court and other Circuits.

(1)

Regulations enacted for the purpose of restraining speech on the basis of its content "presumptively" violate the First Amendment. City Renton v. Playtime Theatres, ___ U.S. ___, 106 S. Ct. 925, 928 (1986). However, content-neutral time, place and manner regulations are permitted if they are narrowly tailored to serve a substantial governmental interest and leave ample alternative avenues of communication. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983); Heffernon v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1980). In the case at bar, the substantial

governmental interest served by regulating the loudness of performances at the Bandshell was the well-being and tranquility of the users of the park and the adjoining community. Kovacs v. Cooper, 336 U.S. 77, 83 (1949). See also Grayned v. City of Rockford, 408 U.S. 104, 119 (1972) (antinoise ordinance was a reasonable regulation; appellant's conduct interfered with the rights of others); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984) (The state has a substantial interest in protecting its citizens from unwelcome noise). The Second Circuit determined, however, that any regulation of speech, not withstanding the type or nature of the local interest served, must be imposed in the "least intrusive" manner possible in order that it can be determined to have been "narrowly tailored." Not only does this approach cast adrift this Court's holdings

that the level of scrutiny of time, place and manner regulations varies with the nature of the forum (Perry Education Ass'n v. Perry Local Educators Ass'n, supra, 460 U.S. at 45), but it allows lower courts to render ad hoc holdings as "(a) judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less restrictive in almost any situation ..." Illinois Election Board v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackman, J. concurring). This skewed reading of the Court's prior decisions warrants this Court's attention.

In Clark v. Community for Creative Non-Violence, supra, 468 U.S. at 299, this Court addressed itself directly to the contention that a National Park Service regulation prohibiting sleeping in a park, as part of a demonstration to call attention the the plight of the homeless, was

unconstitutional because a lower court could hypothesize a less speech-restrictive alternative:

> We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less restrictive alternatives that could have satisfied the government's interest in preserving park lands.

Finding that the Court of Appeals had impermissibly usurped the function of the local authority, this Court held that:

> We do not believe, however, that either the United States v. O.Brien [391 U.S. 367] or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as manager of the nation's parks. Id.

In the case at bar, the Second Circuit not only replaced the Park's Department as manager of the Naumberg Bandshell, but it ignored the factual finding of the District Court that RAR did not need to control the mixing panel to properly implement the

quality and mix of the performances at the Bandshell. Instead, the Second Circuit, locked into its least intrusive standard, provided a solution for a problem that did not exist, and without any technical foundation, held itself out as an electronics expert and ordered the Parks Department to limit volume by use of a "device in possession or control of the City employee." Absent this control, the City can, as so blithely suggested by the Court of Appeals, pull the plug on a musical event and hope that the police can insure public safety and protect park property by controlling the disappointed crowd which may number as many as five thousand.

The standard applied by the Second Circuit is directly contrary to the mandate of this Court. The validity of neutral regulations does not hinge on whether "there is some imaginable alternative that might be

less burdensome on speech." United States v. Albertini, 472 U.S. 675, 689 (1984). Likewise, "[t]he validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." Id. See City of Renton v. Playtime Theaters, supra, ___ U.S. ___, 106 S. Ct. at 928. In other words, the measure of the constitutional validity of a content-neutral regulation is not by way of the inflexible standard used by the Second Circuit.

In Clark v. Community for Creative Non-Violence, supra, 468 U.S. at 297, this Court held that the fact that a more carefully drafted regulation banning sleeping in parks could have accomplished the purposes of the Park's Services "more effectively or less clumsily" than the regulation enacted did not make the

regulation constitutionally infirm. It should not be the function of the Second Circuit to substitute its own judgment as how best to protect the interests of surrounding residents and park users who choose to relax or read or sunbathe from the noise of an event at the Bandshell. "The validity of such regulations does not touch on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests." United States v. Albertini, supra, 472 U.S. at 689.[5]

---

[5] In analogous Fourth Amendment analysis, this Court has noted that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." Illinois v. Lafayette, 462 U.S. 640, 647 (1983). "A creative judge engaged in post hoc evaluation of police conduct can always imagine some alternative means by which the objectives of the police might have been (Footnote Continued)

In short, the Second Circuit has invaded the province of a local governing body, which had by means of an in-depth investigation devised guidelines best suited for the local conditions of Bandshell events. Without any evidence of restriction of expression, the Circuit Court, assuming the role of a regulatory body, has second-guessed that judgment under the guise of the "least intrusive" standard and has devised its own regulation. See Regan v. Time, Inc., 468 U.S. 641, 657 (1984) ("The less-restrictive-alternative analysis ... has never been a part of the inquiry into the

---

(Footnote Continued)
accomplished." United States v. Sharpe, 470 U.S. 675, 686-687 (1984). Therefore, "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." United States v. Martinez-Fuerte, 428 U.S. 543, 556-557 n.12. (1976).

validity of a time, place and manner regulation.")

(2)

The Second Circuit's approach is in direct conflict with the decisions of other circuits, thereby highlighting its failure to recognize that legislative or regulatory bodies enacting statutes or rules are more attuned to the problems of their locale and are in a far better position to make remedial determinations than a court. See, Schultz v. Fishby, 807 F.2d 1339, 1369 (7th Cir. 1986) (Coffey, dissenting), vacated, 818 F.2d 1284 (1987), aff'd, 822 F.2d 642 (1987), further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits, 484 U.S. ____, 108 S. Ct. 692 (1988), rev'd, ___ U.S. ____, 56 LW 4785 (1988).

In Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980), reh. den., 638 F.2d 762

(1981), an action was brought challenging a city ordinance regulating operation of sound amplification equipment. Appellees, who sought to disseminate certain political and educational views among the people of Houston, successfully argued in the District Court that the regulation prohibiting any sound amplification equipment "with an excess of twenty (20) watts of power in the last stage of amplification" was unconstitutional. The District Court used the "least restrictive means" standard as the basis for finding the provisions infirmed. Id. at 386.

The Court of Appeals for the Fifth Circuit rejected this approach noting that "the requirement that a statute be narrowly tailored is only one factor in answering the ultimate question whether the regulation is reasonable. Grayned, 408 U.S. at 116-117, 92 S. Ct. at 2303." Thus, a city is not

required to adopt the least restrictive means of regulation "no matter what the consequences"; rather, the reasonableness of its regulation will be viewed "in the light of less drastic means for achieving the same basic purpose. Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed.2d 231 (1960)." Reeves v. McConn, supra, 631 F.2d at 386. Nevertheless, the Circuit Court found the regulation unconstitutional because the City failed to offer evidence contrary to plaintiff's expert who testified that sound amplification in excess of 20 watts could be non-disruptive. Id at 387.

The Fifth Circuit also found administrative convenience a proper factor for choosing one means of regulation over another. Id. The wisdom of this approach is underscored when one contemplates the possible ramifications of the Court of Appeals' suggestion in the instant case of

pulling the plug at a crowded event at the Bandshell in order to reduce volume. Surely where the District Court in the instant case found no evidence that the City was unable to provide the proper mix under the guidance of the sponsor (A89), the administrative convenience of having a City-designated technician at the mixing board outweighs any theoretical limitation of expression, of which we note, petitioners failed to produce any evidence. In fact, the evidence adduced at trial showed that one year after the Guidelines were in place, no user of the Bandshell expressed dissatisfaction or complained that the sound provided was inadequate or unfaithful to artistic expression (498-499).

The Court of Appeals of the Fourth Circuit adopted the Fifth Circuit's approach in Jim Crockett Promotion, Inc. v. City of Charlotte, 706 F.2d 486 (4th Cir. 1983).

Plaintiffs, owners of and operators of a private general purpose sports and entertainment stadium, sought to restrain enforcement of the City's noise ordinance. The Court of Appeals found that, while amplified speech was within the protection of the First Amendment, municipalities may regulate the sound within reasonable limits. Id. at 491. The regulation must be (1) within the constitutional power of the State or its authorized subdivision, (2) it must further an important or substantial government interest, (3) the government interest must be unrelated to the suppression of free speech, and (4) the incidental restriction on an alleged First Amendment freedom should be no more than is essential to the furtherance of the governmental interest. Significantly, the Circuit Court did not hold that the governmental body must adopt the least

restrictive regulation, no matter the consequences. Instead, like Reeves, the Court held the "reasonableness" of the regulation should be determined "in the light of less drastic means of achieving the same purpose." Id.

(3)

Contrary to the standard of "reasonableness" in determining whether a content-neutral regulation is "narrowly tailored" is the holding in City of Wateska v. Illinois Public Admin. Council, 796 F.2d 1547 (7th Cir. 1986), aff'd without opinion, ___ U.S. ___, 107 S. Ct. 919 (1987), reh. den., ___ U.S. ___, 107 S. Ct. 1389 (1987). In Wateska, the City filed a complaint in state court seeking a declaratory judgment that an ordinance limiting door-to-door solicitation to between the hours of 9 a.m. and 5 p.m. was constitutional. The matter was removed to federal court. The Court of Appeals for the

Seventh Circuit found that based on the holding in City of Renton v. Playtime Theatres, supra, 106 S. Ct. at 925, a four-part test was developing for the consideration of cases involving time, place and manner restrictions. To sustain a time, place and manner restriction on First Amendment activities, the government must show that the restriction is (1) content-neutral, (2) serves a legitimate government objective, (3) leaves open ample alternative channels of communication, and (4) is narrowly tailored to serve the governmental objective. Id. at 1552.

Finding that the Supreme Court does not always spell out the "narrowly tailored" step as part of its standard for evaluating time, place and manner restrictions, the Seventh Circuit erroneously concluded that the "less-restrictive-means standard" is the most faithful to the Supreme Court approach.

Id. at 1553. The Circuit Court found that this Court has emphasized a need for precision in the regulation of the exercise of First Amendment rights and therefore, when analyzing whether a regulation is narrowly tailored, the government must show that the "less restrictive alternatives are inadequate to protect the governmental interest." Id. at 1554. Finding that the City of Wateska had less restrictive means to achieve the objectives of its ordinance, which included peace, quiet and privacy, the Circuit Court struck down the law. Id. at 1557. The Court did not discuss how its conclusion comported with the principle set forth in Clark or Albertini.[6]

---

[6] While this Court affirmed Wateska, it did so without opinion, and thus did not depart from the consistency of its holdings in Clark and Albertini. Moreover, Chief Justice Berger and Justices White and O'Connor (Footnote Continued)

The Seventh Circuit reaffirmed its test recently in Schultz v. Frisby, supra, 807 F.2d at 1339. It bears noting that in its opinion, the Seventh Circuit claimed it had adopted the Eighth Circuit's less restrictive means standard in ACORN v. City of Frontenac, 714 F.2d 813, 818-819 (8th Cir. 1983), another case centered on a challenge to a city ordinance regulating the hours of canvassing. In Acorn, the Court held that since constitutional principles require the regulation to be narrowly drawn to further the legitimate government objective, the proponent must show that less restrictive

---

(Footnote Continued)
dissented from the affirmance and would have "note[d] probable jurisdiction" because it was their view that the Circuit Court's less-restrictive analysis had never been a part of the inquiry into the validity of a time, place and manner regulation. City of Wateska v. Illinois Public Admin. Council, supra, 107 S. Ct. at 920.

alternatives would not meet the government's objectives. Id.

(4)

We believe that this is the appropriate case for this Court as to the proper standard to apply in determining whether an ordinance regulating speech is "narrowly tailored." The impropriety of the least restrictive, less intrusive approach is highlighted by the case at bar where a District Court has found absolutely no restriction of expression, but the Court of Appeals imposed its own view as to how to solve a local problem, as did the Court in Clark, despite the careful consideration and deliberation of the responsible agency, the New York City Parks Department, in promulgating sound regulations. The holdings of Wateska and ACORN show little concern for this Court's holdings in Clark and Albertini. Rock Against Racism reflects

the continued Circuit Court evasion of this Court's mandate in this area of First Amendment law. Further elucidation of this issue by this Court could put an end to this course of conduct and the conflict of views in the Circuit Courts. If the decision below is allowed to stand, the confusion and uncertaintly in the analysis of regulation of speech will continue unabated burdening the government decision-makers and the judiciary in performing their respective roles.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

PETER L. ZIMROTH,
Corporation Counsel of
the City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
JULIAN L. KALKSTEIN,
of Counsel.

August 3, 1988

*Counsel of Record